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No. 93-141

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC., AND
LECOMTE'S DAIRY, INC.,

Petitioners,

v.

JONATHAN HEALY, COMMISSIONER,
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE,

Respondent.

On Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

BRIEF OF MASSACHUSETTS ASSOCIATION OF DAIRY FARMERS, GORDON M. COOK, DAVID W. DUPREY, WARREN E. FACEY, DONALD LEAB, MASSACHUSETTS FARM BUREAU FEDERATION, INC. AND MASSACHUSETTS COOPERATIVE MILK PRODUCERS FEDERATION, INC. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICI*

The Massachusetts Association of Dairy Farmers (the "Association") is an unincorporated association of milk producers located in the Commonwealth of Massachusetts. Messrs. Cook,

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* Counsel for all parties have consented to the filing of this brief *amici curiae*. *Amici* have filed those consents with the Clerk of this Court.

Duprey, Facey and Leab are members of the Association and are owners and operators of dairy farms within the Commonwealth. Massachusetts Farm Bureau Federation, Inc. (the "Federation") is an incorporated, not-for-profit organization consisting of members of all segments of the Massachusetts agricultural industry, including approximately eighty-six percent of the dairy farms in Massachusetts. Massachusetts Cooperative Milk Producers Federation, Inc. (the "Co-op"), a Massachusetts not-for-profit corporation, is a marketing cooperative of approximately seventy Massachusetts dairy farmers. The Association, the four individuals, and the dairy farming members of the Federation and the Co-op are hereafter referred to as the "Producers."

The Producers' farms are part of the dairy industry which the Massachusetts Commissioner of Food and Agriculture declared to be in a state of emergency, thus bringing into effect the Milk Pricing Order which is the subject of Petitioners' attacks. The Producers have a direct interest in sustaining the validity of the Milk Pricing Order in order to avoid the loss of their farms.

The Producers support the decision of the Massachusetts Supreme Judicial Court that upheld the constitutionality of the Milk Pricing Order, and support the position of Respondent in this Court.

STATEMENT

1. In 1992, the Massachusetts Commissioner of Food and Agriculture "determined that an emergency of unprecedented proportions exists within the Massachusetts dairy industry." J.A. 30. The Commissioner's declaration of emergency was underscored by these findings:

(a) In 1991, the average Massachusetts dairy farmer received $12.64 per hundredweight of milk (approximately 11.6 gallons), but it cost farmers an average of $15.50 to produce that same amount of milk (J.A. 27); and "the price of milk in Massachusetts [is] twenty-six cents a gallon less than the national average" (J.A. 18);

(b) Because of this economic shortfall, Massachusetts dairy farmers "are no longer able to pay for feed for the[ir] cows, have been forced to mortgage homes which have been in their families for generations, are working twelve hours, seven days a week to operate at a loss while being forced to forsake such basic necessities as medical insurance for their families" (J.A. 27-28);

(c) Absent some form of relief, according to a professor at the University of Massachusetts, the Commonwealth would lose one-third of its remaining dairy farms in the next year (J.A. 28);

(d) The collapse of the local dairy industry would pose an immediate threat to the supply of fresh milk available to Massachusetts consumers: For instance, "farmers have petitioned the [United States Department of Agriculture] to allow shipments of powdered milk to be trucked to states like Massachusetts, reconstituted, and treated as Class I fluid milk, despite significant losses of flavor and nutritional value during processing and shipping" (J.A. 29); it is a reasonable inference that this proposed "reconstituted" milk, which is to be "treated as Class I fluid milk," will be sold in Massachusetts without labelling to indicate that it has been "powdered" and "reconstituted"; and

(e) The loss of its dairy farms would also seriously endanger the remaining rural aspects of the Commonwealth: "Without the continued existence of dairy farmers, the Commonwealth will lose its supply of locally produced fresh milk, together with the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism, and education." J.A. 13.

2. Consistent with the finding of an emergency, and pursuant to Massachusetts General Laws Annotated ch. 94A, §§ 10-12 (West 1984 & Supp. 1993), the Commissioner on February 26, 1992 issued an order which he called a "Pricing Order," "designed to boost the amount of money local dairy farmers . . . receive for milk above and beyond that required by the Federal [milk pricing] program." J.A. 121.

3. The Pricing Order works in this fashion:

(a) Each milk "dealer"[1] reports the amount of Class I milk (milk consumed as fluid and not processed into other products) which that dealer sold within the Commonwealth of Massachusetts during the preceding month. J.A. 34-35.

(b) The volume of Class I milk sold by the dealer in the prior month is then multiplied by an "order premium" -- one-third of the difference between the federally set "blend price" and the Commissioner-set target price. J.A. 35-36.

(c) The resultant amount is paid by the dealer into the Massachusetts Dairy Equalization Fund ("Equalization Fund"). J.A. 35.

(d) Monies in the Equalization Fund are then distributed to Massachusetts milk "producers"[2] in proportion to the milk produced by that producer during the preceding month. J.A. 36-38.

SUMMARY OF ARGUMENT

The Pricing Order under scrutiny consists of two principal elements: (1) It imposes a nondiscriminatory premium upon every unit of milk sold in the Commonwealth of Massachusetts, from whatever source; and (2) it provides for the payment of a subsidy, out of the Equalization Fund created from those

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[1] The Massachusetts Department of Food and Agriculture defines a milk "dealer" as "any person who is engaged within the Commonwealth in the business of receiving, purchasing, pasteurizing, bottling, processing, distributing, or otherwise handling milk." J.A. 32-33; *see also* J.A. 119 n.3. Each of the Petitioners is a milk dealer. J.A. 119.

[2] The Department of Food and Agriculture defines a "producer" as "any person producing milk from dairy cattle" -- *i.e.*, dairy farmers. J.A. 33; *see also* J.A. 120 n.4. Each of the individual *amici* is a milk "producer" within the Department's definition.

premiums, to the Commonwealth's dairy farmers in order to aid in their continued survival.

Three propositions support the constitutionality of the Commissioner's Order. *One*, this Court's decisions make clear that a State may constitutionally impose a nondiscriminatory premium upon a wholly in-State transaction. *Two*, a State may provide a subsidy to support a local industry without running afoul of the Constitution. *Three*, it is constitutionally inconsequential that the subsidy is related to the premium payments.

Since the order at issue accomplishes the permissible goal of saving Massachusetts' dairy industry without discriminating against or impermissibly burdening interstate commerce, the decision of the Massachusetts Supreme Judicial Court, sustaining the Pricing Order, should be affirmed.

ARGUMENT

These *amici* support the basic arguments presented in the brief filed on behalf of the Commissioner of the Massachusetts Department of Food and Agriculture. In an effort to be of assistance to the Court, and in the interest of the *amici*, counsel submit the further arguments which are set out in this brief.

Petitioners' contentions are summed up in three sentences from their Brief:

> The Massachusetts court reasoned that the Pricing Order is "evenhanded in its application" because "[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the Fund." . . . But it is not just who contributes to the Fund that is the gravamen; it is also who takes out of the Fund. Almost all money paid into the Fund comes from out-of-state milk sources, while all the money paid out is given to in-state producers.

Petitioners' Brief ("Pet. Br.") 24.

Petitioners' understanding of the Pricing Order is largely correct. The Order *does* impose a nondiscriminatory premium upon all milk sold by dealers within Massachusetts' borders. And those whom the Fund benefits are *only* those milk producers located within the Commonwealth. The flaw in Petitioners' assessment of the Pricing Order is found in the third sentence; the money paid into the Fund is paid by dealers, but it does not follow that "all money paid into the Fund comes from out-of-state milk sources." On the contrary, all money paid into the Fund comes from a premium imposed only on the sale of milk within Massachusetts. And the burden of the payment does not fall out of State, but upon Massachusetts consumers. The result is not enough to show a violation of the "dormant" Commerce Clause.

I.

THE SO-CALLED "PRICING ORDER" HAS THE EFFECT OF A TAX ON SALES OF MILK BY DEALERS IN MASSACHUSETTS.

As the Pricing Order under attack was issued by an executive agency, though pursuant to a state statute, the assessed premium is not referred to as a "tax."[3] It is clear, though, that the premium bears many resemblances to a "tax" -- it is imposed by the government and it is paid into a government fund which is distributed in order to serve a public purpose. What Petitioners and their *amici* fail to recognize is that their proposed interpretation of the dormant Commerce Clause would not only affect "Pricing Orders" and similar government actions; it would

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[3] The question is also affected by the "no new taxes" atmosphere which is quite often found today. Thus, government officers generally avoid referring to exactions like this as a "tax" and prefer to use other language to describe the payment. It does appear, however, that "the amount owed to the fund" is "[a] contribution for the support of a government required of persons, groups, or businesses within the domain of that government." *American Heritage Dictionary* 1246 (2d college ed. 1991).

also work a profound change upon this Court's State-tax jurisprudence under the dormant Commerce Clause. Indeed, the "Pricing Order" in practical effect is a taxing provision requiring a payment to the government on *all sales* of fluid milk within Massachusetts. When so recognized, its constitutionality should be undisputed.

Although labeled a "Pricing Order," the Order under attack does *not* fix the price which the milk dealer must pay for milk produced outside Massachusetts. Rather, the minimum price to be paid to the producers for such milk is fixed by federal orders. The Pricing Order specifically provides, in its preamble, that "[t]he price the farmer is paid for his milk is established by a highly regulated federal pricing system." J.A. 32.

The Pricing Order has essentially the same effect as a sales tax on all fluid milk sold by dealers in Massachusetts. Without any reference to the dealer's cost for milk purchased from producers, it adds a charge when the milk is resold in Massachusetts for use as Class I milk. The result is in substance a tax paid to Massachusetts for all such milk sold within Massachusetts (regardless of where that milk was originally produced). The sale which is subjected to this charge occurs within Massachusetts, and the payment to the Commonwealth under the order is simply a cost of doing business, like a sales tax or the cost of transportation of the milk to the point of sale. The assessment of the premium is completely non-discriminatory and is fully applicable to milk produced both within and outside of Massachusetts. The power to impose such a "tax" -- even upon goods which originate out-of-State -- is firmly established in this Court's decisions. *Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869); *Eastern Air Transport, Inc. v. South Carolina Comm'n*, 285 U.S. 147 (1932); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U.S. 62 (1939); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167 (1939). *See also* William B. Lockhart, *The Sales Tax in Interstate Commerce*, 52 Harv. L. Rev. 617 (1939).

II.

THE NONDISCRIMINATORY PREMIUM IMPOSED UPON ALL FRESH MILK SOLD IN MASSACHUSETTS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

A. The Burden Falls On Massachusetts Consumers.

Throughout the Petitioners' brief, the contention is frequently made that the burden of the Pricing Order will fall on out-of-State producers -- in other words, that they will receive less for their milk than they would in the absence of the premium.[4]

There is little if any competent evidence in the record supporting this contention. On the contrary, it seems clear that the chief burden of the charge is borne not by out-of-State producers, but by Massachusetts consumers of milk bought at retail outlets, such as at grocery stores and supermarkets, or by dealers that chose, for competitive reasons, to absorb a part of the assessment as they might with any other cost. *See* J.A. 59. The dealer will base his charge for the milk to retailers on all his costs, which will include (a) the price paid to the farmer, (b) the price of transportation into Massachusetts, and (c) the amount of the Massachusetts premium, together with its other costs of doing business. *Cf. Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976). Since the premium is imposed equally on all dealers, it has no direct competitive effect. All or most of the dealer's costs, with an appropriate profit, will be passed on to the retailer, who, after a suitable markup, will fix his price to consumers in Massachusetts. Since all milk, wherever produced, will be subject to the Massachusetts premium, and not subject to non-taxed competition, the cost burden will fall on Massachusetts

[4] Petitioners, both of whom are milk dealers located *within* the Commonwealth of Massachusetts, nonetheless claim a Commerce Clause injury in that "the Pricing Order is more economically harmful to out-of-state farmers, *and those who deal with them.*" Pet. Br. 19 n.17 (emphasis added).

consumers. The Supreme Judicial Court below (the only court below that reviewed the record) concluded that "[t]he premiums required under the pricing order may have detrimental financial impacts on milk dealers such as West Lynn and LeComte, but those detrimental impacts alone do not in our view run afoul of the commerce clause. Rather, the premiums represent one of the costs of doing business in the Commonwealth, a cost all milk dealers must pay." J.A. 130.

The premium clearly has little, if any, impact on the price received by producers outside of Massachusetts. Any impact on out-of-State producers will be incidental, at most. Petitioners' own expert witness testified via affidavit that the "primary consumer impact is in the higher price that must be paid for Massachusetts milk." J.A. 75. Even the President and Chief Executive Officer of Petitioner West Lynn Creamery, Inc. conceded that the Creamery passed the costs on to its Massachusetts customers: ". . . we attempted to pass on these costs. We're not going to hide the fact that we attempted to pass it on to all our customers." J.A. 58, 65. Indeed, the only injury that Petitioner West Lynn Creamery has itself suffered is a claimed monthly cost of $30,000 to $50,000 "to fund this tax payment." J.A. 58. This cost, however, is attributable not to any constitutional violation on the part of Massachusetts, but to West Lynn Creamery's own business judgment, since it has *chosen* to pass on only about half of the cost of the premium to its customers. *Id.* And West Lynn is a Massachusetts corporation, carrying on its operations, including these sales, in Massachusetts.

The burden of proof in this case is on the Petitioners, who were the plaintiffs in the trial court. They have not produced any evidence which shows that the burden of the tax will fall, in any significant degree, outside the Commonwealth. In fact, the evidence which they have produced shows that Massachusetts consumers have borne the burden of the charge. On this record, it must be concluded that the burden of the tax falls on Massachusetts consumers, who may petition the Massachusetts legislature if, in the future, they become unwilling to pay a few

pennies more for milk in order to preserve the dairy farms of the Commonwealth.

B. In Any Event, The Pricing Order Is Not Discriminatory.

Petitioners claim that the Pricing Order is discriminatory in purpose and effect, and therefore *per se* invalid. *See* Pet. Br. 16-31. It is not. Petitioners, and to a large extent their *amici* as well, reach this conclusion by erroneously focusing their attention not upon the incidence of the tax, but upon the recipients of the subsidy paid from the tax.

1. By properly focusing on the incidence of the premium, it is plain that the Order is nondiscriminatory. To sell milk on the wholesale level in Massachusetts, a milk dealer -- whether located within or without the Commonwealth -- must be licensed by the Commonwealth of Massachusetts. *See* Mass. Gen. Laws Ann. ch. 94A, § 5 (West 1984 & Supp. 1993); *see also* Pet. Br. 3. The Pricing Order imposes a premium upon each unit of milk sold *within* the Commonwealth by a Massachusetts-licensed dealer; it is irrelevant to the Pricing Order whether that dealer is located within or without Massachusetts. Nor is it relevant to the Pricing Order where the milk was originally produced.

Despite the undisputable fact that the Pricing Order applies only to sales of fluid milk which occur within Massachusetts, Petitioners nonetheless seek immunity from paying premiums based simply on the fact that they originally purchased the taxed milk from an out-of-State source. Of course, this is completely contrary to this Court's Commerce Clause jurisprudence, which holds that essentially local actions which benefit in-State interests do not run afoul of the Commerce Clause:

> Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. . . . These principles . . . not only are inevitable corollaries of the constitutional provision, but their unimpaired

> enforcement is of the highest importance to the continued existence of our dual form of government.

Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 351-52 (1939) (footnote omitted). *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

But, more drastically, Petitioners' proposed rule would wholly ignore a fundamental proposition established by this Court's State-tax precedents, that goods sold in-State are not immune from State sales taxes merely because they originate outside the taxing State. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940) (sustaining sales tax "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which apart from its effect on the commerce, is subject to the state taxing power"); *Sonneborn Bros. v. Cureton*, 262 U.S. 506, 508-09 (1923). Thus in *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, 346 (1944), this Court said that where a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce, no violation of the Commerce Clause occurs. That is precisely the case here.

Under this Court's four-part test for determining the constitutionality of State taxes under the Commerce Clause, *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Pricing Order would pass muster because (1) it is "applied to an activity with a substantial nexus with" Massachusetts -- the sale of milk in the Commonwealth; (2) it "is fairly apportioned," because no other State could impose such a premium upon the same sale, and the amount of the premium is proportional to the business transacted in Massachusetts; (3) it "does not discriminate against interstate commerce" because it applies equally to all milk dealers; and (4) it "is fairly related to services provided by the State," such as police and highway services available to milk dealers who transact business within the Commonwealth.

2. Petitioners and their *amici* have also attempted to force their case into this Court's decision in *Baldwin v. G.A.F. Seelig*,

Inc., 294 U.S. 511 (1935). In so doing, however, Petitioners have glossed over the important differences between that case and this one. In *Baldwin*, New York had established minimum prices to be paid to in-State milk producers by milk dealers, a plainly proper system which "has support in our decisions." *Id.* at 519 (citing cases). However, the statute in *Baldwin*, unlike the Pricing Order here, also banned the sale of milk imported from another State unless the same minimum price had been paid to the out-of-State farmers. *Id.* This Court held that the latter requirement ran afoul of the Commerce Clause: New York, which had no sovereign interest in the well-being of Vermont's farmers, was plainly requiring the Vermont farmers to receive the same minimum prices -- not to preserve Vermont's dairy farms, but merely "[t]o keep the system unimpaired by competition from afar." *Id.*[5]

The Pricing Order under attack here thus is far different from the statute at issue in *Baldwin*. For one thing, the incidence of the tax does not fall beyond Massachusetts' borders, unlike the situation in *Baldwin*, where New York "project[ed] its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id.* at 521. Rather, Massachusetts imposes the milk premium upon a wholly in-State transaction -- the sale of milk, within Massachusetts' borders, by a Massachusetts-licensed

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[5] Ironically, the State of Vermont now objects to the fact that the Massachusetts Order does not reach across State borders and pay premiums to Vermont farmers. *See* Br. *Amicus Curiae* of State of Vermont 2, 3, 4, 7. It is, however, "hard to see why out-of-state traders should have a federal right to share in commerce created by the state." Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. Rev. 43, 102 (1988). *See also* Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 540-41 (1981) ("When the states spend money directly on private parties, either through subsidies or through payments for goods and services, they would appear to have the strongest justification for preferring residents as the recipients of those funds").

milk dealer.[6] Indeed, the costs of that premium are ultimately passed on to Massachusetts' milk consumers, who -- if they are not willing to pay a few cents extra for each gallon of milk in order to subsidize the Commonwealth's endangered dairy farms -- may avail themselves of the Massachusetts political processes in order to rescind the Order. Since the Pricing Order has only an intrastate reach, it does not implicate the same concerns for national economic unity as did the overreaching statute struck down in *Baldwin*.

Another important distinction between the statute at issue in *Baldwin* and the Pricing Order under attack here is that the latter does not "set a barrier to traffic between one state and another," as did the statute at issue in *Baldwin*. Rather, the Pricing Order imposes a premium on an in-State transaction which funds a subsidy for in-State dairy farmers. As the Massachusetts Supreme Judicial Court correctly recognized, "[t]he constitutional infirmity in *Baldwin* was not New York State's desire to aid its farmers to the exclusion of out-of-State farmers but, rather, the protectionist nature of the regulation." J.A. 129.

Thus, the Pricing Order does not discriminate against interstate commerce, for it is in substance and effect like a sales tax (or value added tax) imposed upon each unit of fresh milk sold *within* the Commonwealth, without regard to the place where the milk was produced. It does not in any way extend itself to transactions which take place beyond the Commonwealth's borders. Since the Pricing Order at issue suffers from neither of these claimed defects, it does not violate the Commerce Clause.

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[6] *Compare Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1156 (M.D. La. 1973) (three-judge court) ("there is no constitutional infirmity in a state regulation requiring that purely in-state transactions be governed by the Commission's pricing schedules . . . even though the product sold within the state and whose selling price is there regulated, originates outside of the state"), *aff'd*, 416 U.S. 922 (1974).

III.

THE COMMONWEALTH'S SUBSIDIZATION OF DOMESTIC DAIRY FARMERS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

Petitioners' brief, and the briefs of their *amici*, are free in their accusations of "economic protectionism" in the Pricing Order. They say that since *all* milk dealers, in-State or out, are taxed, but only in-State milk *producers* benefit from the subsidy, the Commerce Clause is somehow violated. Petitioners seem to believe that any effort by a State to assist local business interests, which is funded by a tax levied upon a wholly in-State transaction in which both in-and out-of-State businesses engage, is a violation of the Commerce Clause. This is not an accurate reflection of this Court's decisions.[7]

Many cases support the right of a State to promote its own industries: "[P]romotion of local industry is a legitimate state interest in the Commerce Clause context." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 877 n.6 (1985). *See also Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry").

Indeed, such promotion can take the form of a subsidy paid to local industries, but not to foreign ones, so long as the subsidy has a rational basis. "Direct subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause] prohibition; discriminatory taxation of out-of-state manufacturers does." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269,

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[7] *Accord* Collins, *supra* n. 5, at 103: "Yet, the state treasury and state property are, for the most part, simply accumulations of state taxes, collected from out-of-state merchants as well as locals. Even so, reservation of resources for state citizens exports costs to a lesser degree than laws that selectively impose on outsiders. The treasury and other property of a state are sufficiently related to the tax burden on its own citizens to restrain subsidies by normal political discipline."

278 (1988); *see also Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 816 (Stevens, J., concurring); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. at 895 (O'Connor, J., dissenting) ("Moreover, the Court has held in the dormant Commerce Clause context that a State may provide subsidies or rebates to domestic but not to foreign enterprises if it rationally believes that the former contribute to the State's welfare in ways that the latter do not."). Petitioners point to no constitutional requirement that the subsidy must be funded from taxes bearing solely on in-State interests, and indeed they cannot.[8]

Here, it is plain that Massachusetts dairy farms contribute to the Commonwealth's welfare in ways that out-of-State dairy farms cannot. As the Governor's Special Commission Relative to the Establishment of a Dairy Stabilization Fund found, Massachusetts' dairy farmers "have been the stewards of the commonwealth's land since the first decade of the sixteenth [*sic*; perhaps

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[8] Two of Petitioners' *amici*, the Milk Industry Foundation and the Food Marketing Institute, suggest in their joint brief (at p. 24) that this Court has approved subsidies only where the State "limits benefits generated by a state program to those who fund the state treasury" (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 442 (1980)). This quotation from *Reeves* is cropped and incomplete. In full, it is not helpful to Petitioners or their *amici*:

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury *and whom the State was created to serve*. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, *and agricultural improvement and business development programs*. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government -- to serve the citizens of the State.

Reeves, Inc., 447 U.S. at 442 (emphasis added).

seventeenth was intended] century. . . . Without the continued existence of dairy farmers, the Commonwealth will lose its supply of locally produced fresh milk, together with the open lands that are used as wildlife refuges, for recreation, hunting, fishing, tourism and education." J.A. 12-13. At public hearings, citizens of the Commonwealth "expressed concern over losing the rural character of Massachusetts." "The overriding concern" expressed by Massachusetts' citizens in public testimony "was not that the retail price of milk would be raised, but that the natural characteristics of the Commonwealth would be gone forever if we lost our dairy industry." J.A. 17.[9]

The Commerce Clause surely does not stand as a bar to a State's efforts to preserve its countryside. With these important State concerns in mind, Massachusetts could appropriately subsidize its dairy farms in order to preserve a bit of its rural and rustic heritage, as well as a continuous supply of locally produced fresh milk. The Special Commission's findings make clear that Massachusetts' citizens were only too willing to pay the "two cents increase per quart of milk" (J.A. 18) which was estimated to follow from the Pricing Order, in order to preserve the Commonwealth's dairy farms.

In fact, it is common for States to subsidize local interests in similar ways. States may institute farm extension programs. They may reduce state taxes or grant tax holidays in order to encourage out-of-State businesses to relocate there, or to encourage local businesses to remain there. Indeed, New York has recently made efforts to retain its private financial institutions with various public incentives, and has even encouraged the New York Yankees to stay in New York with a potential offer to build

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[9] Again with a touch of irony, the Petitioners' *amicus curiae*, the State of Vermont, bemoans the tide of "creeping urbanization" and the loss of its own dairy farms, noting that this transformation from countryside to urban landscape "is an irreversible process; once dairy farms are transformed into subdivisions, there is no turning back." Br. *Amicus Curiae* of State of Vermont 15.

a new Yankee Stadium in Manhattan. Kevin Sack, *Proposing a Manhattan Stadium Is a Risky Play for Cuomo and His Team*, N.Y. Times, Oct. 3, 1993, at A37, col. 1. *Compare* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 11.8, at 28 (2d ed. 1992) ("If New York were to decide to aid its dairy farmers to compete with Vermont dairy farmers, New York could, under *Baldwin*, decide to give its farmers, e.g., *cash subsidies* or tax relief in the form of reduced property tax or income tax payments.") (emphasis added). *See also Reeves, Inc. v. Stake*, 447 U.S. at 441.

In sum, the encouragement of local industry, by means of a subsidy, is a legitimate goal for a State to pursue; it does not violate the Commerce Clause.

IV.

THE FACT THAT THE PREMIUM PAYMENTS ARE SPECIFICALLY EARMARKED TO SUBSIDIZE MASSACHUSETTS DAIRY FARMERS HAS NO CONSTITUTIONAL SIGNIFICANCE.

Massachusetts has imposed a nondiscriminatory tax by assessing a transaction which is wholly within its borders. It has used those payments to build a Stabilization Fund, disbursements from which are used to subsidize an important local industry with historical, rural significance in the life of the Commonwealth's citizens. As the *amici* have shown, above, these are constitutional means to constitutional ends.

Apparently recognizing that Massachusetts may constitutionally subsidize local industry, Petitioners devote a section of their Brief to arguing that the Pricing Order is not, in fact, a subsidy. *See* Pet. Br. 28-31; *see also* Br. *Amici Curiae* of the Milk Industry Foundation and the Food Marketing Industry 24. Petitioners' argument has two threads to it. The first is that since "the Pricing Order never uses the word subsidy," it cannot be "classified as a subsidy." Pet. Br. 30. The second is that since the subsidy is not paid from general tax revenues, it cannot be classified as a "subsidy." *Id.* at 29-30 & n.26.

Both arguments champion form over substance, and neither is supported by this Court's decisions. In the first place, this Court has repeatedly eschewed distinctions based on labels in the Commerce Clause context. *See, e.g., Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941); *Lacoste v. Department of Conservation*, 263 U.S. 545, 550 (1924) ("Regard must be had to the substance of the measure rather than its form"). Thus, whether or not the State labels the payments a "subsidy" has no constitutional significance. And in any event, it cannot seriously be disputed that State payments to local farmers, whatever they are called, are "subsidies" within the generally accepted definition of that term.[10]

In the second place, it makes no constitutional difference whether the subsidy originates in the State's general treasury or in a separate, earmarked Stabilization Fund, as is the case here. In *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938), a New York statute enabled cities "to adopt and amend local laws, imposing in any such city any tax . . . to relieve the people of any such city from the hardships and suffering caused by unemployment." The statute specifically provided that the revenues of such taxes "shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts" created "for the relief purposes for which the said taxes have been imposed." *Id.*

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[10] *Black's Law Dictionary* (6th ed. 1990) defines "subsidy" as

> A grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, *or which is considered a proper subject for government aid*, because such purpose is likely to be of benefit to the public.

Id. at 1428 (emphasis added). Massachusetts obviously considered that saving the Commonwealth's dairy farms was "a proper subject for government aid" and "likely to be of benefit to the public." *See, e.g.*, J.A. 13, 27-30.

at 584 n.7 (quoting statute). In dismissing an equal protection challenge to the statute, this Court held:

> We conclude, therefore, that the provisions of the legislation earmarking the funds collected are not of importance in determining whether or not the classification of the challenged acts is discriminatory.

Id. at 587. And in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937), Alabama's employers were required to pay a percentage of their payrolls into the State Unemployment Compensation Fund. This Fund was then deposited into the Federal Government's "Unemployment Trust Fund," from which benefits were paid to covered employees in the event of their unemployment. *Id.* at 506-07. This Court held that the earmarking of these funds for unemployed workers was irrelevant to the constitutional calculus: "If the purpose is legitimate because public, it will not be defeated because the execution of it involves payments to individuals," rather than to the general treasury. *Id.* at 518.

Another case involving a "taxing" scheme quite similar to the Pricing Order is *United States v. Butler*, 297 U.S. 1 (1936). *Butler* involved the Agricultural Adjustment Act of May 12, 1933, c. 25, § 9(a), 48 Stat. 31, which imposed a tax "upon the first domestic processing" of certain commodities. The amount of the tax was fixed by the Secretary of Agriculture at a rate equal to the difference between the current average price of the commodity and the price which would have given the commodity "the same purchasing power" as it would have had in the pre-war period 1909-1914. Section 12 of the same Act appropriated "the proceeds derived from all taxes under this title" for specific agricultural purposes, including benefit payments to farmers.

The Court held that the Act was not a "tax" but an unconstitutional economic regulation; and that, for this reason, it was not within the power "To lay and collect Taxes" given to Congress by Article I, § 8 of the Constitution. However, "this distinction proved unworkable, and since its decisions upholding the Social Security Act, the Supreme Court has effectively

ignored *Butler* in judging the limits of congressional spending power." Laurence H. Tribe, *American Constitutional Law* 322 (2d ed. 1988) (footnotes omitted). See, *e.g.*, the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, § 7, 86 Stat. 150, 157, which required mine operators to pay black lung benefits directly to claimants, and which was upheld against a due process challenge in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Petitioners' argument -- that it somehow makes a constitutional difference that the funds collected here are earmarked for Massachusetts dairy farmers -- invites the Court to engraft the same discarded formalism onto its Commerce Clause jurisprudence. The invitation should be declined.

In short, Petitioners would have no complaint if Massachusetts had enacted two separate statutes: one a nondiscriminatory tax payable to the state treasury, the tax being on all dealer sales of fresh milk within the Commonwealth of Massachusetts, and the other providing for a subsidy to the Commonwealth's dairy farmers out of funds in the general treasury. The Pricing Order accomplishes the same thing in a single statute, creating a separate fund from which the subsidies are paid. Petitioners do not, and can not cite any case which gives constitutional effect to such a formalistic distinction. Nor can Petitioners cite any reason for concern that a State may abuse an arrangement like the Pricing Order to undermine the economic unity of this country.

CONCLUSION

For the foregoing reasons, the judgment of the Massachusetts Supreme Judicial Court should be affirmed.

Respectfully submitted,

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